United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1177

B
P/S

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA,

Appellee,

-against-

DOCKET NO. 74-1177

JOSEPH MARANDO,

Appellant.

- x

BRIEF FOR APPELLANT JOSEPH MARANDO

NORMAN I. CAPLAN
Attorney for Appellant
535 Fifth Avenue
New York, New York 10017

INDEX TO BRIEF

TABLE OF CITATIONS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA,

Appellee,

DOCKET NO. 74-1177

-against-

JOSEPH MARANDO,

Appellant

- x

BRIEF FOR APPELLANT
JOSEPH MARANDO

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant in a federal criminal case has a constitutional right to withdraw a plea of guilty, if said application is made to the trial Court prior to sentencing?

2. Whether the denial by the trial Court of the application by defendant's counsel, for an adjournment to permit a formal and complete motion to withdraw defendant's plea of guilty, was arbitray and capricious, and a violated the constitutional rights of the defendant?

STATEMENT PURSUANT TO RULE 28(3)

This is an appeal from a judgment of the United States District Court for the Southern District of New York, rendered after plea before the Honorable Inzer B. Wyatt, on Nov. 15,1973, convictong defendant appellant of conspiracy to violate certain federal laws involving extortionate credit transactions, and from the District Court's denial of an application fora reasonable adjournment for the purpose of permitting the defendant to make a written application to withdraw his plea of gui lty.

STATEMENT OF THE CASE

On November 15, 1973 defendant appeared before Judge Wyatt, waived indictment, and pleaded gui lty to a conspiracy information. The date of sentence was set for January 11,1974.

Subsequetly, but before the date for sentencing, the defendant was indicted by the United States Government in a new matter, and NORMAN I. CAPLAN, was retained as defendant's counsel for that case.

On January 10, 1974, a day prior to sentencing, the United States Attorney was advised by Mr. Caplan that an application would be made the following day to Judge Wyatt for an adjournment for the purpose of permitting the defendant to withdraw his plea of guilty(2)*

* Numerals in parentheses are references to pages of the transcript of the hearing of January 11, 1974

On January 11, 1974 George Meissner, who was the attorney of record for Mr. Marando, and Mr. Caplan appeared in Court before Judge Wyatt.

Mr. Meissner made two applications to the Court at that time, one, to be relieved as counsel, and two, to adjourn the sentencing for thirty days to permit the filing of a motion by Mr. Marando to withdraw his plea of guilty. Both motionswere denied(6) and after further arguement the trial Court again denied the application of defense counsel(7-16).

Mr. Marando was the only defendant in this case, and the Court then proceeded to sentence the defendant.

The Court stated that there was nothing significantly adverse in the pre-sentence report (18, 20) except a recitation of other charges and the sentencing report of Judge Motley, and another indictment pending before Judge Bonsal. (19)

Mr. Meissner pointed out to Judge Wyatt, that both the Allstate case which was tried before Judge Motley, and the case that was present before the Trial Court, involved the same issues, and that in fact the alleged "extortionate loan" was used very significantly by the government in the Allstate trial both during trial and summation(20-22).

Judge Wyatt recognized the fact that these cases actually overlaped, as did Judge Motley when she sentenced Mr. Marando after his conviction in the Allstate case. (30)

Judge Wyatt then sentenced the defendant to five years

imprisonment, but suspended sentence, and placed the defendant on probation for five (5) years.

POINT I

DEFENDANT-APPELLANT HAS A CONSTIUTIONAL RIGHT TO WITHDRAW A PLEA OF GUILTY PRIOR TO SENTENCING BY A TRIAL COURT

The law is well settled that a defendant in a federal criminal case has a constitutional right to a trial by judge or jury. (U,S, v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138)

The law is also very clear that the defendant can waive his right to a jury trial and plead guilty.

However, the law isnot so well defined when the question is raised as to what the rights of a defendant are when he makes an applicati on to withdraw his plea of guilty after such waiver.

Two different and distinct situations arise:

1. An application to withdraw a plea prior to sentencing.
2. An application to withdraw a plea after sentencing.

The United States Supreme Court in 1927 in Kercheval v. United States, 274 U.S. 220, 47 S. Ct 1068, 71 L. Ed. 1009 stated the

fundamental law to be applied and set forth the standard to be exercised. Mr. Justice Butler stated at p. 224 the criteria to be followed:

> " The Court in the exercise of its discretion will permit an accused to substitute a plea of not guilty and have a trial, if for any reason the granting of the privilege seems fair and just"

In this appeal the Court is only concerned with the question of the right to withdraw a plea prior to sentencing.

Since the Kercheval case, the Supreme Court of the United States has used the above standard, and the dicta of the case has been followed in many successive decisions.

In several recent cases the Supreme Court has given the impression that a majority of its Justices may even feel that the right to withdraw a plea of guilty prior to sentencing may be absolute.(See Santabello v. People of New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427(1971); and Dukes v. Warden, Connecticut State Prison, 406 U.S. 258, 92 S. Ct. 1551(1972).

Justice Marshall in his separate opinion in the Santabello case and Mr. Justice Stewart in the Dukes case stated very firmly that it was their opinion that before judgment, the Courts should show solicitude for a defendant who wishes to undo a a waiver of all the constitutional rights that surround the right to trial, which is described by Mr. Justice Stewart as "perhaps the most devastating waiver possible under our Constitution. ".

POINT II

DENIAL BY THE TRIAL COURT OF THE APPLICATION BY THE DEFENDANT-APPELLANT FOR A REASONABLE ADJOURNMENT FOR THE PURPOSE OF MAKING A FORMAL APPLICATION TO WITHDRAW HIS PLEA OF GUILTY PRIOR TO SENTENCING, WAS ARBITRARY AND CAPRICIOUS, AND VIOLATED THE RIGHTS OF THE DEFENDANT UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

Even, arguendo, that we assume that withdrawl of a plea prior to sentencing isnot a constitutional right that is absolute, then followimg the law as stated in Kercheval, supra, and in more recent cases, an application for leave to change a plea of guilty prior to, sentencing should be freely granted if a " fair and just reason for doing so is presented"(See U.S. v Webster, 468 F 2d 769; U.S. v Stayton 408 F 2d. 559) and where there is no prejudice to the government. (U.S. v. Vasquez-Velasco, 471 F 2d 294)

The Court should take note, that after Judge Wyatt gave the defendant-appellant a suspended sentence, the appeal is still being prosecuted. Certainly the defendant cannot be thought to be testing a sentence by this appeal.

The application by the defendant for the relief sought doesnot involve any question of guilt or innocence, and the merits of the request for the relief sought should not be determined on that basis. (Kercheval, supra; Dukes supra).

It is possible, that after a proper proceeding in which the defendant

is given a full hearing, and where the defendant has set forth the evidence which he feels will establish his right to withdraw his plea of guilty, that the trial court in the exercise of its discretion may determine that the defendant has no just and fair reason for the application.

However, this Court must realize that the sole issue before it, isnot whether the defendant has demonstrated grounds which would justify the request to withdrawl of his plea, but whether the denial by the trial court of defendant's request for an adjournment for purposes of presenting a formal application to withdraw the plea, was arbitrary and capricious and violated the defendants constitutional rights.

Since the defendant has been denied an opportunity to make the said application, there is no record on appeal which contains the basis for which the defendant seeks relief, and further, it would not even be proper at this stage of the proceedings to attempt to make such an offer of proof.

Nevertheless, it should be pointed out, that the substantive issues underlying the defendant's application are real, and involve questions of double jeopardy, collateral estoppel, reneged agreements on the part of the United States Attorney, as well as threats of additional prosecution. (See Machibroda v. U.S. 368 U.S. 487, 82 S. Ct. 510, 7 L. Ed. 2d 473).

The trial Court after denying the application of defendant, then proceeded to

sentence the defendant. This in effect, denying the defendant his constitutional right to make his application to withdraw his plea. The defendant has a right to a hearing to determine whether he can sustain a burden of proof as to his reason for his application to withdraw his plea of guilty. (See Walker v. Johnston, 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830)

The only action that would be consistant with "due process" of law would be for this Court to vacate the judgment of conviction and remand this case to the trial court for appropriate proceedings.

CONCLUSION

THE JUDGMENT OF CONVICTION OF DEFENDANT, AS A MATTER OF LAW, AND ON THE FACTS, SHOULD BE VACATED, AND THE CASE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS

Respectfully submitted

Norman I Caplan

NORMAN I. CAPLAN, Esq.
Attorney for Appellant
535 Fifth Avenue
New York City, New York 10017
(212) MU 7 1171

September 12, 1974